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160-247

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 8, Original.

EX PARTE: IN THE MATTER OF THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; WILLLAD KIDDER, AND JOHN W. DAVIS, RECEIVER.

RETURN TO RULE.

1 In the Supreme Court of the United States.

In re The Sanford Fork and Tool Company; Buena V. Marshall, trustee; William R. McKeen; Herman Hulman; Willlad Kidder, and John W. Davis, receiver.

No. . October term, 1895. Proceedings for writ of mandate.

RETURN TO WRIT.

Respondent, William A. Woods, sitting as sole judge in the cause in chancery out of which the above entitled proceedings issue, for return to writ heretofore therein issued, begs leave, first, to refer for a full statement of the facts to the record filed by the petitioners, and the briefs of counsel on file therein.

The action of this respondent, of which petitioners complain here, and which they seek to have revised by these proceedings, arises upon his construction of the opinion and mandate of this court, upon their reversal, on appeal, of decree rendered by him, as such sole judge, in the case of Howe, Brown & Company et al. against them. (157 U. S. 312.)

2 Exceptions had been improperly sustained to the answer of defendants—(petitioners). For this error, as respondent construes the opinion and mandate, the decree was reversed, and the cause remanded to the circuit court with the usual directions for further proceedings there. Upon the return of the cause there and after the erroneous decree had been set aside, but before other step was taken, petitioners moved for decree in their favor on the ground that this court had treated the cause as having been submitted below on bill and answer and that this court having held the answer sufficient, it followed they were entitled to such decree. Respondent could not adopt that view, since it plainly was not what had occurred. There was no such submission of the cause below on bill and answer. Nor in rendering the decree in favor of complainants had respondent "considered" the answer, but had, since sweeping exceptions had been sustained to it, treated it as out of the record, for any purpose of the decree, a fact plainly manifest in the record before this court on appeal.

He could not, therefore, suppose that this court meant, in what is said upon this point, to hold more or other than that the answer was sufficient, and that he had erred in holding it insufficient.

Respondent, therefore, having in view the rules of practice prescribed by this court for the government of the circuit court, held that since, if he had overruled the exceptions to the answer, complainants would have been entitled to file replication, as provided by Rule 66, in equity (printed rules, p. 52), and, if they desired it, to have leave to amend their bill, under Rule 45, p. 46, he did not, nor does believe this court, in reversing the decree, meant to deprive complainants of these rights, but inferred rather, as the more reasonable and logical deduction, that when the circuit court had retraced its steps to the point where the first error occurred, the parties would stand, in respect of the case and of each other, as if in the progress of the cause it had but then arrived at that juncture. To

hold, instead of this view, that complainants had, by their mistake in filing exceptions or by the court's mistake in sustaining them, or by both
things together, forfeited their right to have the cause proceed,
3 when the errors had been corrected in the orderly manner indicated above, seemed and seems entirely illogical and as therefore foreign to the purpose of this court. Respondent accordingly ruled that when he retraced the steps held erroneous by this court the cause should progress as if they had not been taken at all and as if we were but now arrived at that point. To that end he granted, when it was craved, leave to complainants to amend their bill, and would have entered the usual order against them to file replication on or before the next rule day had not petitioners thereupon interposed their motion for stay of proceedings until this application could be heard here.

If respondent's construction of the opinion and mandate involved here does not accord with that of this honorable court, he will make and enter such order and decree, under their direction, as shall.

And he begs leave to refer to brief of counsel for Howe, Brown & Company et al., filed in this proceeding, and to the authorities cited there in support of the views above set forth, and of his rulings, of which complaint is made.

Wm. A. Woods.

(Endorsed:) Supreme Court, U. S. October term, 1895. No. 8, original. Ex parte: In the matter of The Sanford Fork and Tool Co. et al., petitioners. Return to rule. Filed Nov. 22, 1895.

160 U S 247

Office Supreme Court, U. S.
FILED
OCT 21 1895
JAMES H. McKENNEY,
Clerk.

(COPY)

IN THE

SUPREME COURT
OF THE
UNITED STATES.

160-247

In re
THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER,
Petitioners.

No. 8, ORIGINAL.
OCTOBER TERM, 1895.

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS,

to which is prefixed a Notice of such Application
with Acknowledgment of Service thereof, and
to which is annexed a copy of the
Petition proposed to be filed.

ALPHEUS H. SNOW,
GEORGE A. KNIGHT,
Attorneys for Petitioners.

FRANK H. SMITH, PRINTER, 22 N. PENN. ST., INDIANAPOLIS.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

In re THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. MCKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER, *Petitioners.*	NO. , ORIGINAL, OCTOBER TERM, 1895.

To Cyrus F. McNutt and Sydney B. Davis, as Solicitors for the Complainants in the cause of Howe, Brown & Company, Limited, et al., v. The Sanford Fork and Tool Company, et al., in the Circuit Court of the United States for the District of Indiana, and to the Honorable William A. Woods:

You are hereby notified that on the 14th day of October, 1895, at 12 o'clock, noon, or as soon thereafter as the business of the Court will permit, the petitioners, who are the defendants in said cause, will apply to the Supreme Court of the United States for leave to file a petition for a writ of mandamus commanding the Honorable William A. Woods, as judge of the Circuit Court of the United States for the District of Indiana, to enter a final decree in favor of the petitioners, as defendants in said cause, on the bill and answer therein, in accordance with the mandate of the Supreme Court issued June 4, 1895, in pursuance of the decree of reversal entered on the appeal in said cause.

Alpheus H. Snow,
Geo. A. Knight,
Attorneys for the Petitioners.

We acknowledge service of the above notice this 3d day of October, 1895.

Sydney B. Davis,
Cyrus F. McNutt,
Solicitors for the Complainants in the case of Howe, Brown & Company, Limited, et al., v. *The Sanford Fork and Tool Company, et al., in the Circuit Court of the United States for the District of Indiana.*

Wm. A. Woods.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER, *Petitioners.*	No. , ORIGINAL, OCTOBER TERM, 1895.

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The Sanford Fork and Tool Company, Buena v. Marshall, Trustee, William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayor, Willard Kidder, and John W. Davis, Receiver, who were the appellants in the cause of the Sanford Fork and Tool Company, et al., Appellants, *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of this Court, pray the Court for leave to file the attached petition for a writ of mandamus commanding the Honorable William A. Woods, as Judge of the Circuit Court of the United States for the District of Indiana, to enter in said cause in said Circuit Court a final decree in their favor as the defendants in said cause on the bill and answer therein, in the form set forth in the attached petition for writ of mandamus, in accordance with the mandate issued by this Court on June 4, 1895, on decision of the said appeal; and for a statement of the grounds of this application and for proof thereof, petitioners respectfully refer to the attached petition and exhibits, and ask that the matters therein stated be taken in lieu of a fuller statement of the grounds of this application; and that said petition, (the same being verified by the oath of Delos W. Minshall, one of the petitioners herein) and its exhibits, (the same being certified as correct by the Clerk of the Circuit Court of the United States for the District of Indiana) be taken as proof in support of this application.

The petitioners also pray the Court, upon granting this application, to order this cause placed upon the docket of the present term and to make such other orders to expedite the decision of said petition as may be proper.

Alpheus H. Snow,
Geo. A. Knight,
Attorneys for the Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER, *Petitioners.*	NO. , ORIGINAL, OCTOBER TERM, 1895.

PETITION FOR WRIT OF MANDAMUS.

The Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of the Sanford Fork and Tool Company, bring this, their petition for a writ of mandamus against William A. Woods, as Judge of the Circuit Court of the United States for the District of Indiana, and respectfully show to the Court:

1. That there was pending in this Court, between June 3, 1891, and June 4, 1895, the cause of The San-

ford Fork and Tool Company, et al., Appellants, *v.* Howe, Brown & Company, Limited, et al., on appeal from the Circuit Court of the United States for the District of Indiana, as will appear from the files and records of this Court, in which cause these petitioners were the appellants, and Howe, Brown & Company, Limited, Cortland Top and Rail Company and Theodore Stevenson were the appellees.

2. That the bill filed in said cause in the Circuit Court of the United States for the District of Indiana does not waive an answer under oath; that the answer filed in said cause by petitioners, as defendants, is verified by the oath of the defendants McKeen, Hulman, Minshall, Mayer and Kidder; that in the said Circuit Court complainants filed a paper subsequent to the filing of the sworn answer, purporting to be exceptions to the sworn answer, but which was, in effect, a demurrer to the sworn answer; that the said Circuit Court sustained such alleged exceptions, and upon the petitioners, as defendants, refusing to plead further, rendered a final decree for the complainants, stating that the Court had "considered the pleadings" as the basis of its decree.

3. That on the 25th day of March, 1895, this Court entered a decree in the said cause on appeal under the title of The Sanford Fork and Tool Company, et al., Appellants, *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, reversing the decree of the Circuit Court of the United States for the District of Indiana in said cause, and in and by its said decree, this Court ordered as follows:

"And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court."

4. That in and by the opinion of this Court, filed in said cause, as published in the United States Supreme Court Reports, Vol. 157, at pages 316 to 320, it is stated as follows (page 316):

"In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer, and the new matters set forth in the answer, are true. And the question which arises is whether, upon these admitted facts, the decree in favor of the plaintiff can be sustained."

5. That in the statement preceding said opinion, (page 312) it is stated:

"This was a suit commenced in the Circuit Court of the United States for the District of Indiana by the appellees, creditors of the Sanford Fork and Tool Company, to set aside a mortgage given by such Company to secure certain of the directors and stockholders of the Company for indorsements made by them of the Company's paper. No proofs were taken, and the case was disposed of on the bill and answer, and a decree entered in favor of the plaintiffs, adjudging such mortgage invalid as against them."

6. That on the 4th day of June, 1895, this Court issued to the Circuit Court of the United States for the District of Indiana, its mandate in said cause, commanding "that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

7. That on the 6th day of June, 1895, said mandate was duly filed and entered of record, by order of said Circuit Court, in the office of the clerk of said Circuit Court.

8. That on the 11th day of June, 1895, the petitioners, as defendants in said Circuit Court in said cause, by counsel, (the complainants in said cause in said Court being also present by counsel), at a session of said Circuit Court held by the respondent as sole judge of said Circuit Court, presented said mandate and a duly certified copy of the opinion of this Court in said cause, and moved the Court that a final decree on the bill and answer, in compliance with said mandate, be entered in said Circuit Court in favor of the petitioners, as defendants in the said cause in said Circuit Court, and presented to the Court a form of decree to be entered in their favor on the bill and answer.

9. That thereupon the complainants in said cause, by their counsel, moved the Court for leave to amend the bill in said cause, and for time within which to prepare and file such amendments.

10. That thereupon the Court, having heard the argument of counsel, entered an order that both motions were taken under advisement by the Court.

11. That afterwards, on the 4th day of October, 1895, at a session of said Circuit Court held by the respondent, as sole judge of said Court, the petitioners, as defendants in said cause, filed an amended motion for a decree in their favor on bill and answer, and therewith and therein presented to the Court a form of such decree, and moved that the same be entered, which said decree so moved for was in the words and figures following, to-wit:

"This day come the defendants, Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder and John W. Davis, Receiver of the Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight, their solicitors; and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the Court the mandate of the Supreme Court of the United States, bearing date of June 4, 1895, and filed herein on June 6, 1895, in the case of Sanford Fork and Tool Company, et al. *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this Court rendered in the above entitled cause on the 22nd day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains a decree, order and command in the words following to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

"'You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.'

"It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that this cause be, and the same is, held to have been submitted by the complainants upon bill and answer, and that, upon the facts alleged in the bill and answer herein, the law is with the defendants, and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents. All of which is finally ordered, adjudged and decreed."

12. That thereupon the respondent, as sole judge of said Court, entered an order overruling the said motion of petitioners, as defendants, to have said decree in their favor entered, and granting the motion of the complainants in said cause for leave to amend the bill; to which rulings the petitioners, as such defendants, excepted.

13. That thereupon the petitioners, as such defendants, announced to the respondent, sitting as such sole judge and as such Court, that they intended to apply to this Court with all convenient speed for a writ of mandamus to enforce the entry of said decree in their favor, and the respondent, sitting as such sole judge and as such Court, for the purpose of expediting such application for a writ of mandamus, and out of respect for this Honorable Court, as petitioners believe and aver, ordered that all proceedings in said cause be suspended until November 1, 1895, and that in case the petitioners should file in this Court, prior to November 1, 1895, such application for writ of mandamus, all proceedings in said cause should be suspended until the decision of this Court on said application, and further ordered that all proceedings theretofore had since the filing of said mandate in said Circuit Court, should be

made a part of the record in said cause. All of said proceedings in said cause after the date of filing of the mandate in said Circuit Court, will more fully appear by the copy of all said proceedings, duly certified by the Clerk of said Circuit Court, which is marked "Exhibit A," and attached hereto, and which is made a part hereof as fully as if set out at length herein.

14. The petitioners aver that they are advised by their solicitors that said order made by said respondent sitting as such judge and as such Court, overruling the motion of petitioners, as defendants in said cause, to have said decree entered in their favor in said cause, and said order made by the respondent sitting as such judge and as such Court, granting the motion of the complainants in said cause for leave to amend the bill, are proceedings not in conformity with, and inconsistent with the opinion and decree of this Court in said cause, and in violation of the opinion, decree and mandate of this Court in said cause; and that the decree moved for by the petitioners, as such defendants, was a proceeding in conformity with and not inconsistent with the opinion and decree of this Court in said cause, and in full and exact compliance with the opinion, decree and mandate of this Court in said cause.

Wherefore, the petitioners pray this Court that it will issue its alternative writ of mandamus, directed to the respondent, as judge of the Circuit Court of the United States for the District of Indiana, commanding him, as such judge, to grant the said motion of the petitioners as defendants in said cause, for a decree in their favor on the bill and answer, and to overrule the said motion of the complainants in said cause for leave to amend the bill, and to enter the said decree as moved for in favor of the petitioners, as such defendants, or else show cause to this Court, on a day to be named in said writ, why he, as such judge, fails and refuses to perform the matters and take the proceedings commanded by such alternative writ; and that, upon the coming in of the return of the respondent to such alternative writ, this Court will issue its peremptory writ of mandamus, therein commanding the respondent, as such judge, forthwith, under certain pains and penalties therein to be specified, to grant the said motion of the petitioners, as defendants in said cause, for a decree in their favor on the bill and answer, and to overrule the said motion of the complainants in said cause, for leave to amend the bill, and to enter the said decree as moved for in favor of the petitioners, as such defendants. And the petitioners pray for all other proper relief.

ALPHEUS H. SNOW,
GEO. A. KNIGHT,
Attorneys for the Petitioners.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

Delos W. Minshall, being duly sworn, on his oath says that he is one of the petitioners in the above petition, and that he has read the foregoing petition and knows its contents; and that the facts therein stated are true.

D. W. MINSHALL.

STATE OF INDIANA, } ss.
COUNTY OF VIGO. }

Subscribed and sworn to this 9th day of October, 1895, before me,

JOSEPH G. ELDER,
Notary Public.

NOTARIAL
SEAL.

EXHIBIT A.

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY,
LIMITED, ET AL.,
VS.
THE SANFORD FORK AND TOOL
COMPANY, ET AL.

No. 8612.
CHANCERY.

Be it remembered that heretofore, to-wit, at the May term, 1895, of said Court, on the 6th day of June, 1895, before Honorable John H. Baker, one of the judges of said Court, the following proceedings in the above entitled cause were had, to-wit:

Come now Butler, Snow & Butler and George A. Knight, solicitors for the defendants, and present to the Court the mandate of the Supreme Court of the United States in the above entitled cause, which is now by the Court ordered to be filed and spread of record herein.

And said mandate is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Seal of the
Supreme Court
of the
United States.

To the Honorable the Judges of the Circuit Court of the United States for the District of Indiana,
GREETING:

Whereas, lately in the Circuit Court of the United

States for the District of Indiana, before you, or some of you, in a cause between Howe, Brown & Company, Limited; Cortland Top and Rail Company, Limited; and Theodore Stevenson, complainants, and Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of the Sanford Fork and Tool Company, defendants, wherein the decree of the said Circuit Court, entered in said cause on the 22d day of May, A. D., 1891, is in the following words, viz:

"Come now the parties, by their respective solicitors, and thereupon the court, having heard the argument of counsel upon the exceptions of the complainants to the answer of the defendants herein and being sufficiently advised in the premises, doth now sustain said exceptions.

"To which ruling of the court sustaining said exceptions of complainants to the answer of defendants the said defendants here and now except.

"And now come the said defendants, by their solitors, and decline to plead further and elect to stand by their said answer; and the court having considered the pleadings and being fully advised in the premises, it is now ordered, adjudged, and decreed by the court that the mortgage mentioned and described in the complainants' bill of complaint was and is invalid and void. It is further ordered, adjudged, and decreed that the said complainants are entitled to and do receive their *pro rata* share of the proceeds derived from the sale of the property and assets of the Sanford Fork and Tool Company, in application upon the several claims against said company, the same as though said mortgage in said complaint mentioned and described had never been executed and delivered by said Sanford Fork and Tool Company to said defendants named in said mortgage and made beneficiaries thereunder.

"It is further ordered, adjudged and decreed that the said defendants named in and made beneficiaries under said mortgage do take nothing whatever from the assets of or from the proceeds of sale of the assets of said Sanford Fork and Tool Company by reason of or on account of the said mortgage herein decreed to be invalid and void; to which decree and every part thereof the said defendants named in and joining in the said answer to which exceptions have been sustained by the court now here except and pray an appeal to the Supreme Court of the United States, which appeal is now granted by the court upon the filing by said defendants of a supersedeas bond in the sum of $12,000, with sureties to be approved by the court, which said bond, when approved by the court, shall be and operate as a supersedeas and shall supersede and stay all proceedings under this decree pending the appeal therefrom";

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of congress, in such case made and provided, fully and at large appears:

And Whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that the said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

March 25, 1895.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of June, in the year of our Lord, one thousand eight hundred and ninety-five.

Costs of defendants,

Clerk	$70.25
Printing Record	63.00
Attorney	20.00
	$153.25

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

And afterwards, to-wit, at the May Term, 1895, of said Court, on the 11th day of June, 1895, before Honorable William A. Woods, one of the judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY, LIMITED, ET AL.,
VS.
THE SANFORD FORK AND TOOL COMPANY, ET AL.

No. 8612.
CHANCERY

Come now the parties by their solicitors aforesaid, the complainants by McNutt & McNutt their solicitors, and the defendants by Butler, Snow & Butler and George A. Knight their solicitors, and the Court now in obedience to the mandate of the Supreme Court orders that the decree heretofore passed and entered by this Court be set aside, whereupon defendants move that a decree in the words and figures following, be passed and entered in their behalf, to-wit:

"This day come the defendants, Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder and John W. Davis, Receiver of the Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight their solicitors, and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the court the mandate of the Supreme Court of the United States, bearing date June 4th, 1895, and filed herein on June 6th, 1895, in the case of Sanford Fork and Tool Company, et al., *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this Court rendered in the above entitled cause on the 22d day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains an order and direction in the words following, to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.' "

" It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that said cause be, and the same is, held to have been submitted by the complainants upon bill and answer; and that, upon the facts alleged in the bill and answer herein, the law is with the defendants, and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents, all of which is finally ordered, adjudged and decreed."

That thereupon, the plaintiffs interposed their motion for leave to amend their bill herein, and for time within which to prepare and file such amendments; which motions the Court takes under advisement.

And afterwards, to-wit, at the May Term, 1895, of said Court, on the 4th day of October, 1895, before Honorable William A. Woods, one of the judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STAETS

FOR THE DISTRICT OF INDIANA.

Howe, Brown & Company, Limited, et al. vs. The Sanford Fork and Tool Company, et al.	No. 8612. Chancery.

Come now the parties and the defendants now file their amended motion for a decree in their favor in accordance with the mandate of the Supreme Court of the United States, said motion being in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY, LIMITED, ET AL.
vs.
THE SANFORD FORK AND TOOL COMPANY ET AL.

No. 8612,
CHANCERY.

AMENDED MOTION OF DEFENDANTS FOR A DECREE IN THEIR FAVOR.

The defendants move the Court that a decree in the following words be entered herein in their favor in accordance with the mandate of the Supreme Court of the United States:

"This day come the defendants, The Sanford Fork and Tool Company, Buena V. Marshall Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of The Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight, their solicitors, and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the Court the mandate of the Supreme Court of the United States, bearing date June 4. 1895, and filed herein on June 6, 1895, in the case of The Sanford Fork and Tool Company, et al., *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this

Court rendered in the above entitled cause on the 22d day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains a decree, order and command in the words following, to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants, one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.'

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

"'You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.'"

"It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that said cause be, and the same is, held to have been submitted by the complainants upon bill and answer; and that, upon the facts alleged in the bill and answer herein, the law is with the defendants and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents. All of which is finally ordered, adjudged and decreed."

For grounds of this motion the defendants refer to the mandate of the Supreme Court of the United States issued June 4, 1895, upon the decision of the appeal in this cause and to the opinion of the Supreme Court recorded in 157 U. S. Rep., pp. 312 to 320.

ALPHEUS H. SNOW,
GEORGE A. KNIGHT,
Solicitors for Defendants.

And the Court, being fully advised thereon, now overrules the said amended motion of the defendants herein for said decree, and grants the motion of complainants for leave to amend the bill herein; to which ruling defendants except.

And the defendants having announced their intention to apply with all convenient speed to the Supreme Court of the United States for a writ of mandamus requiring this Court to enter a decree on the bill and answer in favor of the defendants, it is now ordered by the Court that all proceedings in this cause are suspended until November 1, 1895, and in case the defendant shall, prior to November 1, 1895, file in the Supreme Court of the United States such application for a writ of mandamus, then all proceedings herein shall be still further suspended until the ruling of said Supreme Court on said application.

And the defendants now move the Court that all the proceedings and motions in this cause in this Court subsequent to the issue of the mandate herein by the Supreme Court, including the proposed decree prayed for by the defendants, be made a part of the record in this cause, which motion is now granted and it is so ordered.

And it is further ordered that the complainants shall not be required to amend their bill herein, under the leave granted, until after the Supreme Court shall have acted upon defendants' proposed proceedings there, if such proceedings be taken; and if such proceedings be not taken within the time limited in this order, the complainants shall have until November 25, 1895, within which to file such amendments.

UNITED STATES OF AMERICA, } ss:
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing in a full, true and complete copy of all papers filed, all proceedings had and all entries made and entered in said Court, in the cause of Howe, Brown & Company, Limited, et al., *v.* The Sanford Fork and Tool Company, et al., upon and subsequent to the filing in said Court of the mandate of the Supreme Court of the United States on June 6, 1895, as fully as the same appear of record and remain on file in my office.

WITNESS my hand and the seal of said Court at Indianapolis in said district, this 11th day of October, A. D. 1895.

Seal of the
Circuit Court
of the
United States
for the
District of Indiana.

NOBLE C. BUTLER,
Clerk.

Office Supreme Court, U. S.
FILED
OCT 21 1895
JAMES H. McKENNEY,
CLERK.

(COPY)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re
THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER,
Petitioners.

No. , ORIGINAL.
OCTOBER TERM, 1895.

PETITION FOR WRIT OF MANDAMUS.

ALPHEUS H. SNOW,
GEORGE A. KNIGHT,
Attorneys for Petitioners.

FRANK H. SMITH, PRINTER, 22 N. PENN. ST., INDIANAPOLIS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. MCKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER, *Petitioners.*	NO. , ORIGINAL, OCTOBER TERM, 1895.

PETITION FOR WRIT OF MANDAMUS.

The Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of the Sanford Fork and Tool Company, bring this, their petition for a writ of mandamus against William A. Woods, as Judge of the Circuit Court of the United States for the District of Indiana, and respectfully show to the Court:

1. That there was pending in this Court, between June 3, 1891, and June 4, 1895, the cause of The San-

ford Fork and Tool Company, et al., Appellants, *v.* Howe, Brown & Company, Limited, et al., on appeal from the Circuit Court of the United States for the District of Indiana, as will appear from the files and records of this Court, in which cause these petitioners were the appellants, and Howe, Brown & Company, Limited, Cortland Top and Rail Company and Theodore Stevenson were the appellees.

2. That the bill filed in said cause in the Circuit Court of the United States for the District of Indiana does not waive an answer under oath; that the answer filed in said cause by petitioners, as defendants, is verified by the oath of the defendants McKeen, Hulman, Minshall, Mayer and Kidder; that in the said Circuit Court complainants filed a paper subsequent to the filing of the sworn answer, purporting to be exceptions to the sworn answer, but which was, in effect, a demurrer to the sworn answer; that the said Circuit Court sustained such alleged exceptions, and upon the petitioners, as defendants, refusing to plead further, rendered a final decree for the complainants, stating that the Court had "considered the pleadings" as the basis of its decree.

3. That on the 25th day of March, 1895, this Court entered a decree in the said cause on appeal under the title of The Sanford Fork and Tool Company, et al., Appellants, *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, reversing the decree of the Circuit Court of the United States for the District of Indiana in said cause, and in and by its said decree, this Court ordered as follows:

"And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court."

4. That in and by the opinion of this Court, filed in said cause, as published in the United States Supreme Court Reports, Vol. 157, at pages 316 to 320, it is stated as follows (page 316):

"In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer, and the new matters set forth in the answer, are true. And the question which arises is whether, upon these admitted facts, the decree in favor of the plaintiff can be sustained."

5. That in the statement preceding said opinion, (page 312) it is stated:

"This was a suit commenced in the Circuit Court of the United States for the District of Indiana by the appellees, creditors of the Sanford Fork and Tool Company, to set aside a mortgage given by such Company to secure certain of the directors and stockholders of the Company for indorsements made by them of the Company's paper. No proofs were taken, and the case was disposed of on the bill and answer, and a decree entered in favor of the plaintiffs, adjudging such mortgage invalid as against them."

6. That on the 4th day of June, 1895, this Court issued to the Circuit Court of the United States for the District of Indiana, its mandate in said cause, commanding "that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

7. That on the 6th day of June, 1895, said mandate was duly filed and entered of record, by order of said Circuit Court, in the office of the clerk of said Circuit Court.

8. That on the 11th day of June, 1895, the petitioners, as defendants in said Circuit Court in said cause, by counsel, (the complainants in said cause in said Court being also present by counsel), at a session of said Circuit Court held by the respondent as sole judge of said Circuit Court, presented said mandate and a duly certified copy of the opinion of this Court in said cause, and moved the Court that a final decree on the bill and answer, in compliance with said mandate, be entered in said Circuit Court in favor of the petitioners, as defendants in the said cause in said Circuit Court, and presented to the Court a form of decree to be entered in their favor on the bill and answer.

9. That thereupon the complainants in said cause, by their counsel, moved the Court for leave to amend the bill in said cause, and for time within which to prepare and file such amendments.

10. That thereupon the Court, having heard the argument of counsel, entered an order that both motions were taken under advisement by the Court.

11. That afterwards, on the 4th day of October, 1895, at a session of said Circuit Court held by the respondent, as sole judge of said Court, the petitioners, as defendants in said cause, filed an amended motion for a decree in their favor on bill and answer, and therewith and therein presented to the Court a form of such decree, and moved that the same be entered, which said decree so moved for was in the words and figures following, to-wit:

"This day come the defendants, Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder and John W. Davis, Receiver of the Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight, their solicitors; and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the Court the mandate of the Supreme Court of the United States, bearing date of June 4, 1895, and filed herein on June 6, 1895, in the case of Sanford Fork and Tool Company, et al. *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this Court rendered in the above entitled cause on the 22nd day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains a decree, order and command in the words following to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

"'You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.'

"It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that this cause be, and the same is, held to have been submitted by the complainants upon bill and answer, and that, upon the facts alleged in the bill and answer herein, the law is with the defendants, and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents. All of which is finally ordered, adjudged and decreed."

12. That thereupon the respondent, as sole judge of said Court, entered an order overruling the said motion of petitioners, as defendants, to have said decree in their favor entered, and granting the motion of the complainants in said cause for leave to amend the bill; to which rulings the petitioners, as such defendants, excepted.

13. That thereupon the petitioners, as such defendants, announced to the respondent, sitting as such sole judge and as such Court, that they intended to apply to this Court with all convenient speed for a writ of mandamus to enforce the entry of said decree in their favor, and the respondent, sitting as such sole judge and as such Court, for the purpose of expediting such application for a writ of mandamus, and out of respect for this Honorable Court, as petitioners believe and aver, ordered that all proceedings in said cause be suspended until November 1, 1895, and that in case the petitioners should file in this Court, prior to November 1, 1895, such application for writ of mandamus, all proceedings in said cause should be suspended until the decision of this Court on said application, and further ordered that all proceedings theretofore had since the filing of said mandate in said Circuit Court, should be

made a part of the record in said cause. All of said proceedings in said cause after the date of filing of the mandate in said Circuit Court, will more fully appear by the copy of all said proceedings, duly certified by the Clerk of said Circuit Court, which is marked "Exhibit A," and attached hereto, and which is made a part hereof as fully as if set out at length herein.

14. The petitioners aver that they are advised by their solicitors that said order made by said respondent sitting as such judge and as such Court, overruling the motion of petitioners, as defendants in said cause, to have said decree entered in their favor in said cause, and said order made by the respondent sitting as such judge and as such Court, granting the motion of the complainants in said cause for leave to amend the bill, are proceedings not in conformity with, and inconsistent with the opinion and decree of this Court in said cause, and in violation of the opinion, decree and mandate of this Court in said cause; and that the decree moved for by the petitioners, as such defendants, was a proceeding in conformity with and not inconsistent with the opinion and decree of this Court in said cause, and in full and exact compliance with the opinion, decree and mandate of this Court in said cause.

Wherefore, the petitioners pray this Court that it will issue its alternative writ of mandamus, directed to the respondent, as judge of the Circuit Court of the United States for the District of Indiana, commanding him, as such judge, to grant the said motion of the petitioners as defendants in said cause, for a decree in their favor on the bill and answer, and to overrule the said motion of the complainants in said cause for leave to amend the bill, and to enter the said decree as moved for in favor of the petitioners, as such defendants, or else show cause to this Court, on a day to be named in said writ, why he, as such judge, fails and refuses to perform the matters and take the proceedings commanded by such alternative writ; and that, upon the coming in of the return of the respondent to such alternative writ, this Court will issue its peremptory writ of mandamus, therein commanding the respondent, as such judge, forthwith, under certain pains and penalties therein to be specified, to grant the said motion of the petitioners, as defendants in said cause, for a decree in their favor on the bill and answer, and to overrule the said motion of the complainants in said cause, for leave to amend the bill, and to enter the said decree as moved for in favor of the petitioners, as such defendants. And the petitioners pray for all other proper relief.

ALPHEUS H. SNOW,
GEO. A. KNIGHT,
Attorneys for the Petitioners.

UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA. } *ss.*

Delos W. Minshall, being duly sworn, on his oath says that he is one of the petitioners in the above petition, and that he has read the foregoing petition and knows its contents; and that the facts therein stated are true.

D. W. MINSHALL.

STATE OF INDIANA, }
COUNTY OF VIGO. } *ss.*

Subscribed and sworn to this 9th day of October, 1895, before me,

JOSEPH G. ELDER,
Notary Public.

NOTARIAL
SEAL.

EXHIBIT A.

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY,
LIMITED, ET AL.,
vs.
THE SANFORD FORK AND TOOL
COMPANY, ET AL.

No. 8612.
CHANCERY.

Be it remembered that heretofore, to-wit, at the May term, 1895, of said Court, on the 6th day of June, 1895, before Honorable John H. Baker, one of the judges of said Court, the following proceedings in the above entitled cause were had, to-wit:

Come now Butler, Snow & Butler and George A. Knight, solicitors for the defendants, and present to the Court the mandate of the Supreme Court of the United States in the above entitled cause, which is now by the Court ordered to be filed and spread of record herein.

And said mandate is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Seal of the
Supreme Court
of the
United States.

To the Honorable the Judges of the Circuit Court of the United States for the District of Indiana,
GREETING:

Whereas, lately in the Circuit Court of the United

States for the District of Indiana, before you, or some of you, in a cause between Howe, Brown & Company, Limited; Cortland Top and Rail Company, Limited; and Theodore Stevenson, complainants, and Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of the Sanford Fork and Tool Company, defendants, wherein the decree of the said Circuit Court, entered in said cause on the 22d day of May, A. D., 1891, is in the following words, viz:

"Come now the parties, by their respective solicitors, and thereupon the court, having heard the argument of counsel upon the exceptions of the complainants to the answer of the defendants herein and being sufficiently advised in the premises, doth now sustain said exceptions.

"To which ruling of the court sustaining said exceptions of complainants to the answer of defendants the said defendants here and now except.

"And now come the said defendants, by their solitors, and decline to plead further and elect to stand by their said answer; and the court having considered the pleadings and being fully advised in the premises, it is now ordered, adjudged, and decreed by the court that the mortgage mentioned and described in the complainants' bill of complaint was and is invalid and void. It is further ordered, adjudged, and decreed that the said complainants are entitled to and do receive their *pro rata* share of the proceeds derived from the sale of the property and assets of the Sanford Fork and Tool Company, in application upon the several claims against said company, the same as though said mortgage in said complaint mentioned and described had never been executed and delivered by said Sanford Fork and Tool Company to said defendants named in said mortgage and made beneficiaries thereunder.

"It is further ordered, adjudged and decreed that the said defendants named in and made beneficiaries under said mortgage do take nothing whatever from the assets of or from the proceeds of sale of the assets of said Sanford Fork and Tool Company by reason of or on account of the said mortgage herein decreed to be invalid and void; to which decree and every part thereof the said defendants named in and joining in the said answer to which exceptions have been sustained by the court now here except and pray an appeal to the Supreme Court of the United States, which appeal is now granted by the court upon the filing by said defendants of a supersedeas bond in the sum of $12,000, with sureties to be approved by the court, which said bond, when approved by the court, shall be and operate as a supersedeas and shall supersede and stay all proceedings under this decree pending the appeal therefrom";

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of congress, in such case made and provided, fully and at large appears:

And Whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that the said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

March 25, 1895.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of June, in the year of our Lord, one thousand eight hundred and ninety-five.

Costs of defendants,

Clerk	$70.25
Printing Record	63.00
Attorney	20.00
	$153.25

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

And afterwards, to-wit, at the May Term, 1895, of said Court, on the 11th day of June, 1895, before Honorable William A. Woods, one of the judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY, LIMITED, ET AL.,
VS.
THE SANFORD FORK AND TOOL COMPANY, ET AL.

No. 8612.
CHANCERY

Come now the parties by their solicitors aforesaid, the complainants by McNutt & McNutt their solicitors, and the defendants by Butler, Snow & Butler and George A. Knight their solicitors, and the Court now in obedience to the mandate of the Supreme Court orders that the decree heretofore passed and entered by this Court be set aside, whereupon defendants move that a decree in the words and figures following, be passed and entered in their behalf, to-wit:

"This day come the defendants, Sanford Fork and Tool Company, Buena V. Marshall, Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder and John W. Davis, Receiver of the Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight their solicitors, and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the court the mandate of the Supreme Court of the United States, bearing date June 4th, 1895, and filed herein on June 6th, 1895, in the case of Sanford Fork and Tool Company, et al., *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this Court rendered in the above entitled cause on the 22d day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains an order and direction in the words following, to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.'"

"It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that said cause be, and the same is, held to have been submitted by the complainants upon bill and answer; and that, upon the facts alleged in the bill and answer herein, the law is with the defendants, and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents, all of which is finally ordered, adjudged and decreed."

That thereupon, the plaintiffs interposed their motion for leave to amend their bill herein, and for time within which to prepare and file such amendments; which motions the Court takes under advisement.

And afterwards, to-wit, at the May Term, 1895, of said Court, on the 4th day of October, 1895, before Honorable William A. Woods, one of the judges of said Court, the following further proceedings in the above entitled cause were had, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STAETS

FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY, LIMITED, ET AL.
vs.
THE SANFORD FORK AND TOOL COMPANY, ET AL.

No. 8612.
CHANCERY.

Come now the parties and the defendants now file their amended motion for a decree in their favor in accordance with the mandate of the Supreme Court of the United States, said motion being in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

HOWE, BROWN & COMPANY, LIMITED, ET AL.
vs.
THE SANFORD FORK AND TOOL COMPANY ET AL.

No. 8612,
CHANCERY.

AMENDED MOTION OF DEFENDANTS FOR A DECREE IN THEIR FAVOR.

The defendants move the Court that a decree in the following words be entered herein in their favor in accordance with the mandate of the Supreme Court of the United States:

"This day come the defendants, The Sanford Fork and Tool Company, Buena V. Marshall Trustee, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of The Sanford Fork and Tool Company, by Butler, Snow & Butler and George A. Knight, their solicitors, and come also the complainants, Howe, Brown & Company, Limited, Cortland Top and Rail Company, limited, and Theodore Stevenson, by McNutt & McNutt, their solicitors, and the defendants now present to the Court the mandate of the Supreme Court of the United States, bearing date June 4, 1895, and filed herein on June 6, 1895, in the case of The Sanford Fork and Tool Company, et al., *v.* Howe, Brown & Company, Limited, et al., No. 190, October Term, 1894, of said Court, reversing the decree of this

Court rendered in the above entitled cause on the 22d day of May, 1891; and a certified copy of the opinion of the Supreme Court of the United States in said cause.

"And it appearing to the Court that said mandate contains a decree, order and command in the words following, to-wit:

"'It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and that said defendants, Sanford Fork and Tool Company, et al., recover against the said complainants, one hundred and fifty-three dollars and twenty-five cents for their costs herein expended and have execution therefor.'

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings not inconsistent with the opinion of this Court.

"'You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.'"

"It is therefore ordered, adjudged and decreed, in accordance with said mandate and opinion, that the said decree of the 22d day of May, 1891, be, and the same is hereby, reversed; and it is further ordered, adjudged and decreed that said cause be, and the same is, held to have been submitted by the complainants upon bill and answer; and that, upon the facts alleged in the bill and answer herein, the law is with the defendants and that the complainants take nothing by their bill, and that the defendants have judgment against the complainants for their costs in this behalf incurred and expended, taxed at two hundred and eighty dollars and sixteen cents. All of which is finally ordered, adjudged and decreed."

For grounds of this motion the defendants refer to the mandate of the Supreme Court of the United States issued June 4, 1895, upon the decision of the appeal in this cause and to the opinion of the Supreme Court recorded in 157 U. S. Rep., pp. 312 to 320.

ALPHEUS H. SNOW,
GEORGE A. KNIGHT,
Solicitors for Defendants.

And the Court, being fully advised thereon, now overrules the said amended motion of the defendants herein for said decree, and grants the motion of complainants for leave to amend the bill herein; to which ruling defendants except.

And the defendants having announced their intention to apply with all convenient speed to the Supreme Court of the United States for a writ of mandamus requiring this Court to enter a decree on the bill and answer in favor of the defendants, it is now ordered by the Court that all proceedings in this cause are suspended until November 1, 1895, and in case the defendant shall, prior to November 1, 1895, file in the Supreme Court of the United States such application for a writ of mandamus, then all proceedings herein shall be still further suspended until the ruling of said Supreme Court on said application.

And the defendants now move the Court that all the proceedings and motions in this cause in this Court subsequent to the issue of the mandate herein by the Supreme Court, including the proposed decree prayed for by the defendants, be made a part of the record in this cause, which motion is now granted and it is so ordered.

And it is further ordered that the complainants shall not be required to amend their bill herein, under the leave granted, until after the Supreme Court shall have acted upon defendants' proposed proceedings there, if such proceedings be taken; and if such proceedings be not taken within the time limited in this order, the complainants shall have until November 25, 1895, within which to file such amendments.

UNITED STATES OF AMERICA, } ss:
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing in a full, true and complete copy of all papers filed, all proceedings had and all entries made and entered in said Court, in the cause of Howe, Brown & Company, Limited, et al., *v.* The Sanford Fork and Tool Company, et al., upon and subsequent to the filing in said Court of the mandate of the Supreme Court of the United States on June 6, 1895, as fully as the same appear of record and remain on file in my office.

WITNESS my hand and the seal of said Court at Indianapolis in said district, this 11th day of October, A. D. 1895.

NOBLE C. BUTLER,
Clerk.

Seal of the
Circuit Court
of the
United States
for the
District of Indiana.

NOV 21 1895
JAMES H. McKENNEY,
CLERK.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

In re

THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER.

No. 8 Orig.
OCTOBER TERM, 1895.
FOR WRIT OF MANDAMUS.

BRIEF OF RESPONDENTS ON PETITION AND UPON RETURN TO WRIT, IF ANY WRIT BE ISSUED HEREIN.

S. B. DAVIS,
McNUTT & McNUTT,
Solicitors for Respondents.
BY C. F. McNUTT.

MOORE & LANGEN PRINTERS, TERRE HAUTE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re

THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. MCKEEN; HERMAN HULMAN; DELOS W. MINSHALL; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER.

No. ....

OCTOBER TERM, 1895.

FOR WRIT OF MANDAMUS.

PETITIONERS.

BRIEF IN BEHALF OF RESPONDENTS.

STATEMENT OF FACTS.

The facts material to a sufficient understanding of the present proceedings are these:

1. On the 17th day of July, 1890, the Respondents, Howe, Brown & Company, limited, et al. as creditors of Sanford Fork and Tool Company, brought their bill against the

Petitioners herein in the Circuit Court for the District of Indiana, to set aside a certain mortgage executed by the Petitioner, Sanford Fork and Tool Company, to its directors, and another, a stockholder, to secure them as endorsers on certain of the Company's liabilities; on the ground that said mortgage constituted an unlawful preference by said corporation of said directors and said other shareholder, as creditors.

See Record in S. F. & T. Co. et. al. Appellants vs. H. B. & Co. et. al., pp. 1 to 10.

2. Defendants in said action filed a demurrer to said bill (ibid p. 10); which was overruled (p. 11).
3. Defendants filed answer (pp. 11 to 23).
4. To this answer, complainants filed exceptions, numbered 1st, 2d, 3d, 4th and 5th (pp. 31 to 45).
5. The exceptions were sustained, (p. 53), to which ruling defendants excepted, (p. 53); and electing to stand upon their answer, declined to plead further, (p. 53).
6. Whereupon, the Court passed and entered a decree for complainants setting aside the mortgage and for costs, (p 53).
7. From this decree defendants appealed to this Court; (p. 53); assigning errors here:
    1. The Circuit Court erred in sustaining the exceptions of the complainants to the answers of the defendant-appellees herein.
    2. The Circuit Court erred in adjudging and decreeing that the mortgage mentioned and described in the complainants' bill of complaint was and is invalid and void.
    3. The Circuit Court erred in adjudging and decreeing that the complainants—appellees herein—are entitled to do and receive a full *pro rata* share of the proceeds of sale of the property and assets of the Sanford Fork and Tool Company as though said mortgage by said Sanford Fork and Tool Company to said other defendants-appellants herein mentioned and described in complainants' bill of complaint had never been executed and delivered to said defendants-appellants herein

mentioned in said mortgage; and said Circuit Court further erred in adjudging and decreeing that said defendants-appellants herein named in and made beneficiaries in said mortgage do take nothing whatever from the assets or from the proceeds of sale of said Sanford Fork and Tool Company by reason of or on account of said mortgage executed by said Sanford Fork and Tool Company to said other defendants-appellants herein.

John M. Butler,
Solicitor for Appellants.

8. This Court reversed the decree of the Circuit Court.
S. F. & T. Co. et. al. vs. H., B. & Co., limited, et. al. 157 *U. S.* 313.

9. The cause having been remanded to said Circuit Court, and standing there for further proceedings, on the 6th day of June, 1895, defendants therein, Petitioners here, moved to have the mandate of this Court in said cause spread of record; which was done. (Record filed in this proceeding, pp. I. to IV).

10. Afterward on the 11th day of June, 1895, said Circuit Court entered an order, "in obedience to said mandate," setting aside its former decree; whereupon defendants moved for finding and decree upon said mandate in their favor; and complainants moved for leave to amend their bill, and for time to prepare same; which motions the Court took under advisement. Same Record, pp. IV, V, VI.

11. Afterward on the 4th day of October, 1895, defendants filed an amended motion for finding and decree, in their favor. The Court thereupon overruled said motion of defendants, and sustained complainants' motion for leave to amend the bill, and defendants announcing their intention to apply to this Court for a mandate, it was ordered that further proceedings in the cause be stayed until this Court should pass upon such application. Same Record, VII, VIII, IX, X.

ARGUMENT.

This proceeding, while it purports to have been taken to obtain a construction of the mandate of this Court to the Circuit Court, it will be found, in fact, to be an application to have that mandate enlarged by the interpolation of matter, wholly illogical and inconsonant with the opinion of this Court, upon which said mandate rests. The prayer of the petition, here, is, in effect, that the mandate reading: "*You, therefore, are hereby commanded that such execution, and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to the right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding,*" shall be altered to read: "You, therefore, are hereby commanded to set aside the decree heretofore by you rendered, and to take and deem said cause to have been, on complainants' motion, set down for hearing and submitted for final decree, on bill and answer; and thereon to find that upon the facts alleged therein, the law is with the defendants, and that complainants take nothing by their bill, and that defendants have judgment for their costs," &c.

This would not be a *construction* of the mandate, but the making of a new judgment and decree by this Court, would amount to an interpolation in the body of the mandate, of a decree, additional to that one upon which the mandate heretofore issued, proceeded.

The judgment and decree pronounced, is: "It is now here ordered adjudged and decreed, by this Court, that the decree of the said Circuit Court be and the same is hereby reversed with costs, and that said defendants * * * recover against said complainants one hundred and fifty three dollars and twenty-five cents for their costs herein expended and have execution therefor."

When the judgment is simply reversed, the order of reversal reaches back through the record to the point where the first error constituting ground of reversal supervened, and the mandate, in effect, if not in express terms, directs the Court below to retrace its steps to that point. All steps and the record of them, back to the latest proper one, are expunged and the record is cleansed of them, and the parties are remitted to the positions occupied at the moment when the last right step had been accomplished, and before the first wrong step had been entered upon. The only seeming exception arises where a cause is reversed for error occurring in the progress of a *trial*; in such case the reversal reaches back to the issues, and a new trial must be had *de novo*. But the trial is a *unit*; but a single step in a series of steps, and it is because that is so, that a reversal for an error occurring during its progress reaches back to its beginning. For an interesting discussion on this point, we refer to the case of *Winton vs. Conner*, 24 *Ind.*, 107.

True the statutes of Indiana provide what effect a reversal of a cause shall have, in these respects; but they but declare what the law were, in reason, and in the nature of judicial proceedings, if no statute existed.

The parties being so restored to the former proper *status*, they must proceed with their wager of battle as if nothing had occurred to arrest their progress; the losing party worsted, to be sure, to the extent of the costs incurred by his adversary in procuring a restoration of this proper *status;* but in no other particular. If they had arrived, before the first error supervened, at a point where the next lawful step forward would be a judgment, for one or other party, that judgment must now be entered. If the next lawful step would have been the filing of answer, the answer must now be filed; as, if a defendant has filed demurrer to his adversary's bill, and the court has erroneously sustained that demurrer, and rendered judgment for him; on reversal of such judgment on appeal, complainant is not entitled, on the coming back of the cause, to judgment, as upon default, or as if the bill had been confessed. The defendant is still entitled to answer the bill, notwithstanding his mistake in filing the demurrer and the Court's mistake in sustaining it. And so, it matters not at what point in the succession of events the case may have arrived when the first error supervened, when the Appellate Court has corrected the error and sent the case back to the trial Court, the cause proceeds from that point, just as if no other step had ever been taken.

But it may be said, these suggestions are too obvious to need stating even; and so they are, and we feel it hardly less than impertinence to make them to this highest Court. Our apology, however, is that it is precisely these simple principles of practice the petitioners here are seeking to have violated, disregarded.

The cause between these parties had proceeded in the Circuit Court regularly and without any errors occurring until the Court sustained certain exceptions filed by complainants to the answer of defendants. Following this erroneous ruling, the defendants refused to plead further, electing to stand upon their answer, exceptions to which had been sustained. Whereupon the Circuit Court entered a decree for complainants. From that decree defendants appealed to this Court, where the decree below was reversed, as we understand the record, on the ground that the answer *was sufficient;* and the cause was remanded with the mandate already set out, herein.

Now applying the simple principles and rules of practice recited above, to the facts of this record, how will the case be found to stand?

The first error complained of and source and father of all subsequent errors, was the sustaining of complainants' exception to defendants' good and sufficient answer.

The judgment of this Court is: "It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs." Then follows judgment in favor of Appellants against Appellees for costs. This is all, and this is perfectly consistent with the opinion preceding it. "The answer is sufficient," is the sum of that opinion. The exceptions ought to have been overruled, the logic of it. The mandate commands the Circuit Court that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right, &c., "ought to be had." According to the rules of law, what ought the Circuit Court to do? to have done when the case came back there? The first thing was to retrace its steps back to the point where it committed the first error: that of sustaining exceptions to a "sufficient answer." To that end, it must set aside the decree it has rendered, and overrule the exceptions; leaving the record standing precisely as if, instead of having sustained, it had overruled, the exceptions, in the beginning. And if it had done that, that is, had overruled the exceptions in the first instance, what next, in the orderly course of events, waited to be done? The complainants would have been required to file general replication on or before next succeeding rule day.

Rule 66 of Practice in Equity, p. 52; Printed Rules (1893).

Or, if the allgations of the answers made it necessary they might have had leave to amend their bill.

Rule of Equity Practice 45, p. 46.

Or, both the rule to file replication, and leave to amend bill on or before next rule day might have been entered.

Petitioners here insist, not that the foregoing is not the orderly method of procedure in equity in the Courts of this Jurisdiction, but that for some reason, for some exceptional condition, or notion of such condition, all more or less vague and hypothetical, this particular case is not to be proceeded with *so*; that it is, in some sort, *sui generis*; and is to have some new and hitherto unheard of rules of practice applied to it; rules, too, which this Court should make now for this singular case.

In this connection and as strengthening the grounds of their contention, somewhat is endeavored to be made of a recital of the Circuit Judge leading up to the decree below, wherein occur the words: . . . . "and the Court having considered the *pleadings*, and being fully advised, &c."

How far an answer to which exceptions have been sustained, and the defendant has declined to plead further, should be considered by the Court in rendering its decree, we do not know, though it seems it should not be considered at all.

> *See Mix vs. People*, 116 *Ill.*, 265. *Hemphill vs. Miller*, 16 *Ark.*, 271. *Chapman vs. Pittsburg R. Co.*, 26 *W. Va.* 300.

If so, "pleadings" may have been, as without impropriety it might be, predicated of the bill, alone. If it was not so employed, then its use may well be regarded as a *lapsus calami*, and as nowise significant or controlling.

The rule is: "If further answer be not filed the bill will be taken as confessed."

> *Encyc. Pleading and Practice, Vol.* 11, 918, *and note 3.*
>
> *Pegg vs. Davis*, 2 *Blfd.* (*Ind.*) 281.
>
> *Craig vs. People*, 47 *Ill.* 487.
>
> *Work vs. Hall*, 79 *Ill.* 196.
>
> *Mayer vs. Tyson*, 1 *Bland* (*Md.*) 559.
>
> 6 *Humph.* (*Tenn.*) 18.
>
> *Cummings vs. Cory* 58 *Mich.* 494.
>
> 1 *Barb. Ch. Prac.* 2d *Ed.* 194.

But counsel for Petitioners seems to rest his contention that new rules should apply to this case at this juncture, on what he claims to be the totally defective and technically insufficient nature of complainants' exceptions to the defendants' answer. These "exceptions," he says, and repeats, were not exceptions at all; but in form and effect were a general demurrer. And he brings forward those numbered 1st, 2nd, 4th and 5th, omitting any reference to that numbered 3rd. And while we would not impugn counsel's candor, we think it may be fairly doubted if such omission was intended to serve, as it certainly does, as the *nota bene*, as to said 3rd exception, since upon inspection, it will be found, if not very skillfully drawn, sufficient to present a question entirely proper to be presented by an exception.

We insert it here: "3d. And said complainants further except to the said answer. * * * for that the said respondents have not to the best of their remembrance, information and belief answered the allegations of complainants' bill of complaint, wherein complainants specifically charge that at the time of executing the said mortgage to said Buena V. Marshall as trustee, &c., the said Sanford Fork and Tool Company was insolvent and was then known by said director to be insolvent."

(*Record Sanford Fork & Tool Company vs. Howe, Brown & Co., limited et al., on Appeal, page 43.*)

We submit the foregoing exception in form and substance conforms to the requirements of the rules governing such pleading, and presents a question proper to be presented by an exception.

The same is true of the larger part of exception number 5. *Record S. F. & T. Co. et. al., vs. H. B. & Co., limited, pp. 43, 44, 45.* The last clause of that exception is: "*And complainants except to the whole answer, because it containes no denial of complainants' charge that the respondent corporation was insolvent when said mortgage was executed, March 17th, 1890.*" (Same Record p. 45).

We think it will be found that the 3d exception and a part of the 5th contain proper objections, within the rules governing such pleadings, and properly presented several questions, material to be passed upon, and such too, as, if the particular exceptions had been sustained, would have obliged the defendants to file further answer.

Foster's Federal Prac. Sec. 153, p. 225–26.

Loveland's "Forms in Fed. Procedure" p. 192 : Form 212.

No objection was made to these exceptions. If exceptions are informal, or irregular, the defendant must object to them for such reason. And if they are set down for hearing, no such objection having been made, such irregularity is waived.

Foster's Fed. Prac. Sec. 153, p. 226.

Brooks vs. Byam, 1 Story, 298 et. seq.

In fact, no motion or objection whatsoever was ever made against these exceptions as it respects their form or substance.

And when defendants reach this Court upon appeal, they assign no error, bringing in review any such matter.

We admit, the first of them, in substance, little differs from a general demurrer for want of facts, and that the others except the third are framed mainly, as if their purpose were to present questions of the sufficiency of the answer to bar complainants' action; but all parties and the Court, treated them as proper, in form and sufficient in substance. Beyond the fact that so far as such faults in exceptions can be waived, defendants did waive then in this instance, we do not know that such acquiesence should go for such. It certainly argues that counsel on both sides were wanting in accurate knowledge touching the real office of exceptions to answer.

And, no doubt, it is widely true, the discussions of like questions by Federal judges, found in many cases, indeed show it to be too generally true, that lawyers, used mainly to Code Practice, wherein all distinctions have been abolished, and where the same rules apply to all manner of causes, and used to rules of Equity practice, on the Chancery side of the Federal Courts, only, know too little of these rules. We frankly confess our ignorance, and feel an imperative vocation laid upon us to amend it. But we have come upon no case, as yet, where either this Court, or any lower Court of this jurisdiction, has visited mistakes from such ignorance with other penalties than those logically resulting from them. And we confidently submit that to interpret, or construe the decision of this Court in this case, and the mandate following it as Petitioners, here, are seeking to have done, involves consequences entirely illogical.

In the very case upon which counsel for Petitioners appears to rely chiefly, the course we insist upon was taken. A *demurrer* was filed to the answer; the Court struck it out and ruled that plaintiff should file reply.

"*The demurrer to the answer*" says the Judge, "*having been improvidently filed, will be stricken out and leave granted complaints to* set the case down on bill and answer, *or to file the usual* [illegible]*lication on or before the next rule-day.*

Crouch vs. Kerr, 38 *Fed. R.* 549, *at* 551. See also,

Edward vs. Drake, 15 *Fla. p.* 666.

But here, it is insisted, as we take counsel, that where the improvident demurrer or exception is sustained, and the decree following upon such ruling is reversed, by this Court, the mandate should be construed to direct the Circuit Court, not to set aside the decree and overrule (or strike out) the exceptions, and proceed from that point as if that point had but then been reached, but to set aside the decree, overrule (or strike out) exceptions, and render judgement, on bill and answer, for defendants, without further proceedings, and as if the cause had been set down, on complainants' motion, upon bill and answer, for final determination.

Why apply such rule to this case? To punish complainants? But Courts of Equity do not treat mistakes as crimes, and do not, we submit, depart from the orderly administration of the law to punish them, as is insisted here, shall be done.

Under the first head of argument, (Petitioners' Brief, p. 9), counsel maintains, in effect, that simply to reverse the decree of the Circuit Court, and allow that Court to proceed in the orderly manner, we have suggested, or in any manner except to enter a decree for defendants, would be tantamount to holding that such Court had "jurisdiction" to receive and rule upon the "so-called exceptions to answer," which were in fact demurrers to the answer, and that it (merely) *erred* in ruling on the exceptions.

We do not quite understand what the learned writer means by "jurisdiction," here. It appears to us a rather large word to employ in such connection. The general rule is, that if a Court has jurisdiction of the subject-matter of a controversy, and has acquired jurisdiction of the parties to it, the adoption and use of unauthorized rules of procedure would not involve any question of jurisdiction, and certainly would not operate to defeat the jurisdiction. The proceedings would be irregular, simply; erroneous. And if it should be found to have worked substantial injury to the party against whose rights it had operated, it would be ground for reversing the judgment against him and for nothing more.

"A judgment of a court of competent jurisdiction, *though rendered in a form of proceeding unknown to our practice* and apparently without service of process, *cannot be treated as a nullity.*"

Brown on Jurisdiction, Sec. 64, p. 182, *Note* 1, *citing Weyer vs. Zane*, 3 *Ohio* 305.

Buell vs. Cross, 4 *Ohio* 329.

But, it should seem, no question of this sort arises here. As we have seen, Defendants made no objection to the exceptions filed to their answer, in respect to either their form or substance. No motion was made to "remove them from the files," none to strike them out in whole or in part. Consequently no exceptions were, or could have been, reserved respecting such matters. And when the cause reached this court, on appeal, the only assignment of error touching the exceptions, at all, was predicated of Appellant's exception to the ruling of the Court in *sustaining* said exceptions: "*The Circuit Court erred in sustaining the exceptions of the complainants to the answer of defendants, appellees (sic) herein.*"

Such assignment raised no question except that of the sufficieny of the answer to withstand the exceptions. In strictness, if there was a single ground of exception well taken to the answer, such assignment would not have entitled Appellants to a reversal, though all the other exceptions were ill taken.

True, the Supreme Court of Florida, in the case cited by Petitioner's counsel in speaking of a demurrer filed to an answer in equity, to which defendant had made no objection, says: "While there was no objection by defendant to the filing of this demurrer by plaintiff, and while defendant went to a hearing upon the demurrer, without objection, still *this* Court cannot sanction a totally unauthorized practice. We cannot determine what is the legal effect of an unauthorized pleading, because the law gives it none. *And*," they add, "*the judgment based upon it can only be reversed.*"

Edwards vs. Drake, 15 *Fla.* 666.

Counsel contends—*Brief*, *p.* 10—that this Court treated the case, on appeal, as having been decided below as if submitted on bill and answer.

While asserting nothing on this head, we do not so interpret the opinion in the case. To be sure, in order to pass upon the correctness of the decree below, *this* Court must of necessity have considered both bill and answer, and before a reversal of that decree could have been reached, we suppose it must have decided that as the pleadings—bill and answer—stood, defendants were entitled to judgment.

But it does not follow that this Court meant to hold what appears to us a wholly illogical proposition; namely, that the Circuit Court, after having sustained exceptions to the answer in all its parts, at once proceeded to give that answer all the force it could have had, if the cause had been submitted upon the bill and it, for final decree. The reasonable presumption would have been, that in passing its decree the answer was treated as out of the record, as it manifestly *was*, and could only be restored by the Circuit Court's retracing its steps and revising its rulings, or by this Court's reversing those rulings.

The reversal, as soon as the Court below obeyed the mandate following upon it by setting aside its erroneous decree, had the effect to restore the answer to its place in the proceedings; where it now stands awaiting the order of the Court overruling the exceptions; an order which, no doubt, would have followed the setting aside of the decree, had not the Defendants—Petitioners herein—interposed a motion for judgment in their favor. *See "Exhibit A,"* filed with Petition in this Matter, *p.* V.

Counsel for Petitioners devote considerable space to the proposition that this Court has held in certain cases, that a mandate framed similarly to the one in the present case necessitated the entry ~~in~~ of a final decree.

We think that indisputable; as, for instance, where the Circuit Court, upon submission of the cause upon the bill and answer, by plaintiff, (for he only can so submit it, we think), enters a deree contrary to equity, and this Court reversed that decree, with mandate in the precise language of this, the plain duty of the Circuit Court would be the entry of judgment for the party prevailing here. The cause, in such case, stands ready for final decree. That is the next event in the sequence of events; the next orderly step.

The case of *Stewart, admr. vs. Salamon*, 94 *U. S. p.* 434, cited by Petitioners' counsel, well illustrates this proposition.

There the Circuit Court, on final trial, had entered decree for a sum greatly in excess of what was due complainant. This Court finds that fact, and then proceeds to find the exact amount due at a given date, and concludes: "*This amount with interest, will constitute the sum which should be adjudged due*, and to its payment the proceeds of the mortgaged premises, when sold, should be applied.

"The decree of the Circuit Court must therefore be reversed and the cause remanded for further proceeding in accordance with this opinion," &c.

When the case reached the Court below after reversal, appellant made effort to open it up and to obtain leave to file new pleadings introducing new defenses. But the Court overruled his application and entered a decree in conformity with the opinion and mandate of this Court, and the appellant appealed again. He had made no objection to the form of the decree; nor, so far as the report of the case discovers, to the perfect propriety of the substance of it. His appeal was dismissed: the Court saying he could not open up the case at such juncture. 97 *U. S.* 361.

The case of *Gaines vs. Rugg*, 148 *U. S.*, 228, is of like purport. There, this court, in its opinion, approved the decree below, in respect of the title to the land in controversy, but disapproved that part which related to the amount of rents which the defendant was adjudged to pay, and to the basis upon which they had been reckoned. The judgment reversed the decree below and directed the Circuit Court to proceed in conformity with the opinion of this Court, &c.; employing the same *formula* as is employed in the mandate in the present case, and as appears to be commonly if not always used here. But instead of entering a decree in conformity with the mandate, the Court below was proceeding to open up the whole case, and to *re-try the question of title*.

Manifestly such course was not in harmony with the opinion and mandate; but in the teeth of them, rather.

We concede, nay, we claim, and rest our cause there, that the opinion of this Court, pronounced in a cause before it, becomes the "right and justice" of, and "the laws of the United States" (within the meaning of the mandate), respecting every matter in such case to which such opinion speaks. And where the opinion passes upon any question in the case, the Court below and the parties to the action can look no further, or otherwheres for the "*law*" or "the right and justice" of that question.

To know the meaning of the opinion we must, to be sure, know many other things; as, the nature of the issues and the like. But when we have found out that meaning, we can but abide by it, and give it effect.

The contention of counsel for petitioners, that parties can not by agreement or by acquiescence set aside a rule of practice, is undoubtedly sound. But he fails to differentiate "agreement" or "acquiescence," and their effect, and a *failure to make objection* to a pleading filed as prescribed by the rule, for want of either technical or substantial sufficiency. And, so far as we have been able to discover, failure to object for such grounds has no different effect in equity proceedings from that it has in proceedings at law.

The rule everywhere prevails that technical informalities, and generally, substantial defects in pleadings, may be waived by the party entitled to assail them. For instance, it is universal, we believe, that pleas in abatement and dilatory pleas generally, must be verified. Yet if the adversary party join issue upon such plea, unsworn, without objection, he waives such defect, and will not be heard to say, after, that the appellate Court must go behind such waiver and treat the plea as a nullity, lest a rule subversive of the statute might so come to be established.

Nay, so effective and far-reaching is this rule, that, if a defendant fail to object to the sufficiency of the declaration, and join issue upon it, he can not in the absence of a statute, assign such insufficiency as a ground of error, though he has been stripped of his estate by means of it.

Indeed rules of practice, whether prescribed by statute, or by the Court pursuant to statute, or in the exercise of its inherent powers, are, except those respecting mere *decorum*, made for the protection of the rights of the parties, and no sound reason can be found, we think, why parties may not waive their requirements. This is a different thing from that conduct which should work a *subversion* of the rules; and respects such conduct only as amounts to a waiver of the party's rights to have them strictly complied with.

Now, granting the exceptions filed to the answer, in this case, were irregular; wanting in technical sufficiency; or continent of much not strictly in the nature of exceptions, as contemplated by the rules of this Court respecting such pleading and their filing; the fact still remains that they were filed *pursuant* to, not in *disregard* of, those rules, and actually do contain clear grounds of exception. But if they had been wholly wanting in these particulars, still, purporting to be exceptions, and being treated on all sides, and by the Court, too, as such, they did, in strictness of speech, *conform* to the rules. Just as an informal and wholly insufficient answer filed to a bill, would be in conformity with, and not subversive of, the rule respecting that pleading and its filing; and would be dealt with precisely as if without defects in these respects. The complainant, in such case, must either file exceptions to it, or move to have the cause set down upon bill and answer or file replication.

Encyc. Pleading and Prac., vol. 1., *p.* 896, *note* 3.
Travers vs. Ross, 14 *N. J. Eq.*, 254.

"And upon appeal it is too late for him to say that the paper filed *as an answer was no answer*. He treated it as an answer by taking exceptions to it, as the statute required."

Holly vs. Powell, 63 *Ill.*, 139.

Under the second head of argument, Petitioners' Brief here, p. 20, Counsel says: "Assuming, (but by no means admitting,) that the opinion, decree and mandate of this Court are open to a construction which would authorize the ruling of the respondent, as sole Judge of the circuit court, counsel for Petitioners cannot believe, as was claimed by counsel for the complainants in the circuit court, that this court intended that such construction should be placed upon them in order to relieve the complainants from the consequences of their mistake in filing their so-called 'exceptions to answer,' and in order to punish the defendants because they did not point out the mistake by filing a motion to strike the so-called 'exceptions to answer' from the files."

On first reading this passage, we regarded it as merely suppositious, on the part of counsel on the other side, of what counsel on this, *might, could or would* say; but upon closer inspection we were surprised to find it an assertion of what we *had really said*.

Now, we quite understand that such extraneous, and, so far as the merits of the present controversy are concerned, entirely inconsequential, matter should not engage the time and attention of this court, nor usually that of counsel; but to attribute such language, or the sentiment which could inspire it, to a lawyer, is to disparage at once his intelligence and his sense of propriety; just as such sentiment, if entertained or expressed, were to disparage the wisdom and judicial fairness of this highest court. We have, therefore, adverted to it, that we might say, we are at loss to imagine from what words of ours the writer could have made such inference; since the only one of counsel, on this side—the present writer, namely—who made any observations on the occasion referred to, avers here that such thought as could have been father to such expression never entered his mind. For however glad or grateful we might feel at being *fairly* extricated from a difficulty, into which our inadvertence or ignorance might have precipitated us, we really flatter ourselves that we should feel neither glad nor grateful at being extricated at so great a cost as the violation of a rule of law, or the *punishment* of an adversary, who had been guilty of nothing more than standing by and suffering us to commit the folly.

We hope we may be pardoned another allusion, somewhat of the same nature as the foregoing. Taken all together, it appears to us, the writer of Petitioners' Brief, is not unwilling to have it inferred that counsel on that side were lying in wait for counsel on this, if not for the Court itself; that *they* knew, all the while the exceptions filed to their answer, were inapt and properly presented no question.

We think, on this head, we are better qualified to speak than the writer of Petitioners' Brief, since, as we remember, he was not present nor took any part in the proceedings below upon those exceptions, while we were.

That The late Mr. Butler, his senior, now, to the sorrow of many departed to realms where these and like questions come not, we would fain believe, to vex his trained and splendid faculties, thought these exceptions not merely informal, but as inapt to present any question touching the "sufficiency" of the answer, is entirely incredible to those who witnessed his conduct and heard his argument in respect of them, or to any who may have read his brief on appeal, prepared some months later, wherein only in a very general way, and not at all with that earnestness and confidence characterizing his arguments when he felt sure of his footing, he questions their propriety. And we think if need were, we might well defend him against any charge or suspicion of having lain in wait for counsel or the Court below.

In conclusion, we submit, this cause stands in the Circuit Court for further proceedings in conformity with the opinion of this Court, under the rules of Equity Practice, and that the next orderly step is the overruling of the exceptions to answer.

That following that order complainants will be entitled, precisely as if that order had been made following the argument upon the exceptions, to file, under leave, amendments to the bill, made necessary by matter in the answer, and file the general replication.

The cause, we submit, should not be treated as standing for decree as if it had been submitted on bill and answer. In the progress of events, the case had passed the stage for such submission, which is upon the coming in of the answer. It is to be presumed complainants had inspected, upon its filing, the answer with reference to that step, and had resolved against it as perilous, and decided to file exceptions to it. If these exceptions had been overruled they would have been entitled to amend bill and file replication. They are unable to see any reason why the appeal and reversal should operate to destroy that right.

Respectfully submitted,

S. B. DAVIS,
McNUTT & McNUTT,
Solicitors for Respondents.
By C. F. McNUTT.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re
THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER,
Petitioners.

NO. 8, ORIGINAL,
OCTOBER TERM, 1895.
Petition for Writ of Mandamus.

STIPULATION WAIVING ORAL ARGUMENT AND SUBMITTING CASE ON BRIEFS.

FRANK H. SMITH, PRINTER, 22 N. PENN. ST., INDIANAPOLIS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In re

THE SANFORD FORK AND TOOL COMPANY; BUENA V. MARSHALL, TRUSTEE; WILLIAM R. McKEEN; HERMAN HULMAN; DELOS W. MINSHALL; ANTON MAYER; WILLARD KIDDER; AND JOHN W. DAVIS, RECEIVER,

Petitioners.

No. 8, ORIGINAL,

OCTOBER TERM, 1895.

STIPULATION.

In the above entitled cause it is stipulated that oral argument on hearing of the petition, order and return herein is waived, and the case is submitted to the Court upon the petition and return, and upon the brief in behalf of the petitioners filed herein at the time of the application for leave to file petition, and the brief of Cyrus F. McNutt and Sydney B. Davis, and any other briefs that may be filed herein by counsel for any parties interested, prior to the date set for making return herein.

ALPHEUS H. SNOW,
GEO. A. KNIGHT,
Attorneys for Petitioners.

WM. A. WOODS, *pro se.*
CYRUS F. McNUTT,
SYDNEY B. DAVIS,
Solicitors for Howe, Brown & Co.